C. P. 160.

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# Supreme Court of the United States.

OCTOBER TERM, 1902.

Filed December 9, 1902.

THE NORTHERN PACIFIC RAILWAY COMPANY,
*Plaintiff in Error,*

vs.

ARNIE TOWNSEND, MINERVA TOWNSEND AND JOSEPH HOLSOME.

BRIEF FOR PLAINTIFF IN ERROR.

C. W. BUNN and
JAMES B. KERR,
*of Counsel.*

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THE NORTHERN PACIFIC RAILWAY COMPANY,
*Plaintiff in Error,*

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ABNER TOWNSEND, MINERVA TOWNSEND AND JOSEPH HOLECEK.

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## STATEMENT.

This is a writ of error to the supreme court of Minnesota. The question is, whether the railway company is devested of a parcel of its right of way granted by congress (act of July 2, 1864) by adverse occupation under the statute of limitations of Minnesota. The supreme court of Minnesota adjudged that its title would be so devested (Transcript, pp. 26-33) and so denied a right specifically

set up and asserted under the said act of congress.

The action was ejectment brought by the railway company to recover possession of a portion of the right of way granted by congress. The title relied on was the congressional grant. The judgment of the supreme court of Minnesota concedes the original validity of that title, but holds that it has been devested by adverse possession for the time made necessary by the statute of the state. We concede and conceded in the state court, that the adverse possession required by the state law had existed in point of fact for the necessary length of time. Our sole point in the state court was and in this court is, *that the statute could not operate to take away the title granted by the act of congress.*

Therefore the case clearly presents a question, which may be brought to this court by writ of error from the highest court of the state.

The transcript shows that the railroad referred to in the act of July 2, 1864, was built as required by the act and that the premises sued for lie within two hundred feet thereof (Transcript, pp. 10-15 and plat opposite p. 14). The railway fences were built fifty feet from the track, and a short snow fence on the north side was one hundred feet therefrom; outside the fence or fifty foot line lie two strips one on each side the track, both within two hundred feet therefrom. The whole hundred and fifty foot strip on the south side and that part thereof outside the snow fence on the north side of the track have been continuously cultivated and possessed by the defendants in error and

their grantors since about 1878 (Transcript p. 12).

The premises are within the grant of right of way granted by the second section of the act, which says, "two hundred feet in width on each side of said railroad, where it may pass through the public domain." The premises were public domain until after the road was built (Transcript, pp. 11-13).

By mortgage foreclosure the *railway* company plaintiff in error has succeeded to all the railroad property of the grantee in the act (Transcript, p. 12).

## Assignment of Error.

Errors are duly assigned in the record (Transcript, pp. 4, 5). They may be summed up in one proposition, viz:

The court erred in holding that any part of the right of way conferred on the company by the act of congress can be devested and acquired by adverse occupation under a state statute of limitation.

## Argument.

It is not doubted that some state limitation laws run against municipal corporations and even against the state. Whether they do depends entirely on their

terms and upon state policy. Both the construction and effect of such statutes are ordinarily purely questions of state law. We need not concern ourselves therefore with an inquiry, as to whether the state law in question would run against the state of Minnesota, or its municipal corporations. Neither is it important whether the state statute pre-supposes a grant or is merely one of repose. So much of the opinion of the supreme court of Minnesota (Transcript, pp. 30-31) as is devoted to these questions is immaterial to the question before this court.

Whether the statute can operate against the United States, or its agencies, or its grants made for purposes in which the whole nation has an interest, is a question of federal law, depending on the nature of the title against which the state statute is claimed to operate.

We take it as self evident that the law of the state cannot devest any title or right which the act of congress has made incapable of alienation.

If the premises in question might be granted or otherwise alienated by the railway company, we concede that limitation laws may operate upon them. But if the act of congress created a public trust, a right of way incapable of alienation by any act of the grantee, its officers and agents, then we submit that the property cannot be acquired adversely to the grantee by limitation.

We regard the test question as being, whether the railway company is capable under the terms of the act of congress of conveying, or estopping it-

self from claiming, the right of way granted by that act, or any part thereof.

Considering the great width of the grant and that it extended approximately two thousand miles through an unimproved and unpeopled country, it will appear quite natural and probable that the railway did not and could not go to the expense of clearing and fencing in the whole strip, and it is quite apparent that as settlers flocked into this vast region the company could not and probably would not desire to exclude them from cultivating or otherwise using such portions of this four hundred foot strip as were not for the time being required for railway uses.

But the time has come, as this case shows, when the company should know its rights and duties. So far as its private advantage is concerned it would probably be promoted by a decision that it may sell off such parts of its right of way as its officers think are not necessary to be held for railway use. Considering the growth of villages and cities along the line and the desirability of locations adjacent to the tracks, the value to the company of the right to sell strips and parcels of the granted right of way is apparent. Therefore our wish in this case is mainly, to have the company's rights and duties defined. Which way the case shall be decided is a secondary consideration.

That the Pacific railroads and the charter provisions for their maintenance and continuous operation were matters of general interest to the people of the nation will doubtless not be questioned. Sec-

tion 1 of the act conferred power on the corporation to lay out, locate, construct, furnish, maintain and enjoy, a *continuous* railroad and telegraph line from Lake Superior to Puget Sound. Through the public domain section 2 granted a right of way four hundred feet in width, exempt from taxation within the territories. Section 3 created a large land grant to secure the construction and continuous maintenance of the road. Construction was supervised by commissioners appointed by the president (sec. 4). Section 5 provided how the road must be built and that the company should not charge the government higher rates than individuals. The right of eminent domain was conferred by section 7. Section 9 reserved the right to congress to complete the road. Section 10 secured to all the people of the United States the right to subscribe for its stock. Section 11 made it a post road subject to the use of the United States for government service and subject to such regulations as congress might impose respecting charges for government transportation.

The court has decided in *New Mexico v. United States Trust Company*, 172 U. S., 171, that this right of way is not a mere easement, or right of passage, but a fee title, conferring on the company the sole and exclusive right of occupation.

In *Northern Pacific Railroad Company v. Smith*, 171 U. S. 260, 275, it was decided that the company was entitled to the full width of 200 feet on

each side of the road, and that this width could not be diminished by any court or tribunal upon the ground that a less width was sufficient for railroad purposes. The court said that by granting a way of 400 feet in width congress must be understood to have conclusively determined a strip of that width to be necessary for a work of such importance. The court said in the same case (p. 276) that a forfeiture for mis-user of this right of way could not be enforced in a private action.

It must doubtless be conceded that the company could not alienate *the whole* of this right of way, or any such part thereof as would disqualify the corporation from performing its public functions and from carrying out the scheme contemplated by the act. The grant of right of way is a public trust which the directors of the company have no right to alienate or fritter away.

The case comes, therefore, down to the question whether the directors and officers of the company have a discretion, in face of the expressed declaration of congress that 400 feet is necessary, to say that a less width of right of way is sufficient. While everyone must concede that for the time being a less width is entirely sufficient in most places, are the officers and directors of this company authorized to conclude that for all time a less width will be necessary? Has such a discretion been conferred upon them by the act of congress? Has the corporation itself any more right to determine that less width than 400 feet is necessary, and to sell off 300 feet than it would have to

sell the whole? If the corporation may sell a part where is the line to be drawn? Does not that doctrine imply the right to sell the whole? Has the corporation itself any more right than a court or jury to adjudge contrary to the declaration of congress, that 100 feet are sufficient? Is it not the better rule as indicated in the case of *Smith*, above cited, that the declaration of congress, to the effect that 400 feet in width is necessary, is conclusive?

If the corporation may sell off portions of the right of way, it may disqualify itself or seriously impair its ability to perform its public functions, and may prevent the government from having and at all times enjoying a military and post road. It is well proven that the wisdom of the corporation cannot safely be trusted to hold onto all that is or may be forever necessary. We have already reached the time when nearly all railway companies are hampered for lack of ground and other facilities, although they have more than anyone would have fixed as necessary thirty years ago. Neither will it do to concede the power of the corporation to sell, relying on its future ability to buy or condemn. For the price in time may be prohibitory or excessively burdensome; and the corporation could probably not be *compelled* to buy or condemn.

We submit that under the decisions of this court the corporation is incapable of alienating any part of the right of way granted by congress.

In *The York and Maryland Line Railroad Company v. Winans*, 17 How. 30, p. 39, the court speak-

ing by Mr. Justice Campbell, said:

> "Important franchises were conferred upon the corporation to enable it to provide the facilities to communication and intercourse, required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided, as a remuneration to the community for their grant. The corporation cannot absolve itself from the performance of its obligations, without the consent of the legislature. *Beman v. Rufford*, 1 Simon N. S. 550; *Winch v. B. and L. Railway Company*, 13 *L. and E.* 506."

In *Gue v. Tidewater Canal Company*, 24 How. 257, it was held that the franchises and property of such corporations cannot be dismembered by sales on execution.

In *East Alabama Railway Company v. Doe*, 114 U. S. 340, it was held that right of way of a railway company could not be sold on execution, or otherwise, to a purchaser who did not own the franchise.

In *Thomas v. Railroad Company*, 101 U. S. 71, p. 83, the court said:

> "There is another principle of equal importance and equally conclusive against the validity of this contract, which, if not coming exactly within the doctrine of *ultra vires* as we have just discussed it, shows very clearly that the railroad company was without power to make such a contract.
>
> "That principle is that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due per-

formance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void as against public policy."

In *Hartford Insurance Company v. Chicago, Milwaukee & St. Paul Railway Company*, 175 U. S. 91, p. 99, the court sustained the validity of a lease by the railway company of a portion of its right of way; but it appears in the case that this lease was for one year (or such longer time as the lessee might be permitted to remain in possession) for the purpose of erecting and maintaining a cold storage warehouse. The court said that the railway company might permit its right of way to be occupied by others with structures convenient for the receiving and delivering of freight upon its railroad, *so long as a free and safe passage was left for the carriage of freight and passengers.* Under this language, it would seem, that in case of such a lease, if the necessities of the railway company for public use at any time in the future require it, the possession of the lessee must give way to the railway use. This appears to be the reason why such a lease is valid, and the same reasoning would lead to the conclusion that a permanent alienation of the property is void.

In *Grand Trunk Railroad Company v. Richard-*

*son*, 91 U. S. 454, p. 468, the court used this language:

> "If the buildings of the plaintiffs were rightfully where they were, if there was no trespass upon the roadway of the company, it was clearly a pertinent fact to be shown; and while it must be admitted that a railroad company has the exclusive control of all the land within the lines of its roadway, and is not at liberty to alienate any part of it so as to interfere with the full exercise of the franchises granted, we are not prepared to assert that it may not license the erection of buildings for its convenience, even though they may be also for the convenience of others. It is not doubted that the defendant might have erected similar structures on the ground on which the plaintiffs' buildings were placed, if in its judgment the structures were convenient for the receipt and delivery of freight on its road. Such erections would not have been inconsistent with the purposes for which its charter was granted. And, if the company might have put up the buildings, why might it not license others to do the same thing for the same object; namely, the increase of its facilities for the receipt and delivery of freight? The public is not injured, and it has no right to complain, so long as a free and safe passage is left for the carriage of freight and passengers.

The following decisions in state courts support the contention: *Slocumb v. Chicago, Burlington & Quincy Ry. Co.*, 57 Iowa, 675; *Union Pacific Ry. Co. v. Kindred*, 43 Kas. 134; *Southern Pacific Company v. Hyatt*, 132 Cal. 240; *Railway Company v. Telford's Exec.*, 89 Tenn. 293.

To hold that the company may be devested of its title by abandonment, estoppel, deed, or hostile oc-

cupation leads at once into difficulties. The title under the act of congress, though a fee, is a conditional or base fee. It would be forfeited for breach of condition if the railway were abandoned and taken up. Why would not each parcel be forfeited for breach of condition as sold by the company or taken from it by adverse occupation? But the right to take advantage of a breach of condition would we think be in the United States. If the company abandons, the land must go back to the government, in order to enable it to secure the carrying on of the government post and military road. It has never, so far as we know, been decided and we think will not be, that the United States granted the right to enter for breach of condition to the patentees of the adjoining sections. After condition broken it must be that the right to enter is in the United States. The right to re-enter for breach of condition subsequent is not an estate in the land or a reversion and can be taken advantage of only by the parties or their privies in right of representation, as heirs, executors, etc., in case of natural persons, and by the successors of political bodies. Assignees and grantees of the reversion and privies in estate cannot take advantage of the condition. *Ruch v. Railway Co.*, 97 U. S. 693; *Shephard's Touchstone*, p. 149; *Bangot v. Warren*, 34 Maine 324; *Hooper v. Cummings*, 45 Maine 359; *Smith v. Smith*, 23 Wis. 180; *Nicoll v. Railway Company*, 12 N. Y. 121; *Rice v. Railway Company*, 12 Allen 141.

It is moreover a well established rule that

if the holder of a right to re-enter for breach of condition convey before making an entry, the right to enter for breach of the condition is gone. "The original maker of the condition cannot enforce it after he has parted with his right of reverter, nor can his alienee take advantage of a breach because the right was not assignable." *Hooper v. Cummings*, 45 Maine 359; *Rice v. Railway Company*, 12 Allen 141; 5 *Viner's Abridgment*, title Condition.

Moreover as stated in 2 Greenleaf, Cruise ch. 2:

> "A condition being entire cannot in general be apportioned by act of the parties; therefore a grantee of part of the reversion shall not take advantage of a condition. As if a lease be made of three acres of land reserving a rent upon condition; and the reversion of two acres of the land is granted away. The rent shall be apportioned by act of the parties; but the condition is destroyed; for that is entire and against common right."

For these reasons the United States will not be held to have parcelled out and sold its right of re-entry for condition broken by patenting the adjoining lands. The ultimate question in this case is, therefore, whether a state statute of limitation runs against the United States; not, let it be noted, with respect to land which the United States holds as a private proprietor, but with respect to a public trust in which the whole people are concerned.

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